

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7075

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Richard W. Baldwin

-----X
ESSO NEDERLAND b.v., :

Plaintiff-Appellee, :

-against- :

M.T. TRADE FORTITUDE, her :

engines, boilers, etc. :

and MARASTRO COMPANIA NAVIERA, S.A., :

Defendants-Appellants. :

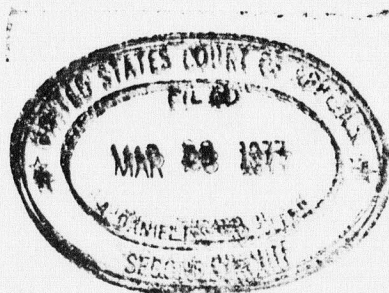
Docket Number
77-7075

BRIEF FOR APPELLANTS

(On Appeal from the United States District
Court for the Southern District of New York)

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TABLE OF CONTENTS

	<u>Page</u>
Table of Cases	11
Table of Other Authorities	11
Statement of Issues Presented	1
Statement of the Case	2
Statement of Facts	3
Argument:	
POINT I	8
POINT II	13
Conclusion	22
Addendum	24

TABLE OF CASES

	<u>Page</u>
<u>Du Pont de Nemours International,</u> <u>S.A. v. S.S. MORMACVEGA, 367 F.Supp. 793</u> <u>(S.D.N.Y. 1972), aff'd. 493 F. 2d 97</u> <u>(2d Cir. 1974)</u>	21
<u>Gleb v. Automobile Ins. Co. of Hartford,</u> <u>168 F.2d 774 (2d Cir. 1948)</u>	21
<u>Schroeder Bros., Inc. v. The Saturnia,</u> <u>226 F.2d 147, 149 (2d Cir. 1955)</u>	8
<u>Skidmore v. Swift & Co., 323 U.S. 134,</u> <u>65 S.Ct. 134 (1944)</u>	20
<u>Sonken-Galamba Corp. v. Thompson,</u> <u>225 F.2d 608 (10th Cir.), cert. den 350</u> <u>U.S. 896, 76 S.Ct. 154 (1955)</u>	20
<u>Venesta v. Walford Lines, [1922]</u> <u>12 Lloyd's L.R. 139</u>	9

TABLE OF OTHER AUTHORITIES

<u>Carver's Carriage by Sea (12th ed. 1971) . . .</u>	9
<u>EVROS, Society of Maritime Arbitrators,</u> <u>Award No. 1059 (Sept. 27, 1976)</u>	17
<u>MARIANTHI K, Society of Maritime Arbitrators,</u> <u>Award No. 1058 (Oct. 5, 1976)</u>	17
<u>VIRGINIA LILY, Society of Maritime Arbitrators,</u> <u>Award No. 1052 (Aug. 31, 1976)</u>	17

STATEMENT OF ISSUES PRESENTED.

I

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT A COMPARISON OF MEASUREMENTS TAKEN OF THE VESSEL'S TANKS UPON HER ARRIVAL AT THE DISCHARGE PORT WITH MEASUREMENTS OF THE VESSEL'S TANKS TAKEN AT THE LOADING PORT WAS THE PROPER METHOD FOR DETERMINING THE EXTENT OF THE VESSEL'S LIABILITY FOR SHORT DELIVERY OF ITS CARGO.

II

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THERE IS NO CUSTOM IN THE TANKER TRADE FOR A CARRIER TO BE GIVEN A 0.5% ALLOWANCE FOR LOSS OF CARGO IN TRANSIT.

Statement of the Case

This is an appeal from a judgment by the Honorable Marvin E. Frankel, Judge of the District Court for the Southern District of New York, wherein the appellee's claim for a shortage of cargo upon delivery by the appellant in the amount of \$64,880.51 was granted to the extent of \$36,725.44.

The proceedings in the District Court were commenced on or about February 5, 1975, by the filing of a Complaint with said Court. A trial was held before Judge Frankel on October 20 and 21, 1976. The Findings of Fact and Conclusions of Law of Judge Frankel dated January 21, 1977 and the Judgment approved by him on January 26, 1977, were filed in the District Court on January 28, 1977. The appellants filed their Notice of Appeal on or about February 10, 1977.

Statement of Facts

The appellants herein are the M.T. TRADE FORTITUDE, a Panamanian flag vessel ("the vessel") and its Owner, Marastro Compania Naviera, S.A., a corporation organized under the laws of Panama ("Carrier"). The appellee is Esso Nederland b.v., ("Esso") a Netherlands corporation, who was the consignee of the cargo of crude oil that was carried by the vessel and is the subject of this dispute.

On or about January 21, 1975, while performing under a time charter party for Standard Tankers (Bahamas) Co., a subsidiary of Exxon Corporation, the vessel was ordered to Bonny, Nigeria, where it loaded a cargo of Nigerian crude oil for carriage to Rotterdam.

At Bonny the vessel loaded the following quantities of Nigerian crude oil:

	<u>Light</u>	<u>Medium</u>	<u>Total</u>
Gross	33,278 1/tons	27,726 1/tons	61,004 1/tons
Net	33,179 1/tons	27,690 1/tons	60,869 1/tons

These amounts were the same amounts that were given in the shore tank measurements* (App. p. 13) and were the figures reflected in an Ocean Bill of Lading which named Esso as the consignee (App. p. 15).

*All references to Appendix refer to the volume containing Exhibits except those referring to the Court's opinion or to testimony indicated by "T".

It should be emphasized that both of the parties in this action have conceded that the quantities of crude oil set forth in the Bill of Lading, i.e., 61,004 long tons (gross), or 450,827 U.S. barrels, and 60,869 long tons (net), or 449,968 U.S. barrels, were the total amounts of crude oil loaded on board the vessel. Not only did Esso request that the Carrier admit that these were the amounts actually loaded on board the vessel at Bonny, but at the trial Esso's attorney conceded that there was no issue as to the amount of cargo taken on board..(App., p.T 50).

Exxon International Corp. ("E.I.C."), a division of the Exxon Corporation, purchased ~~these~~ amounts of crude oil from BP Trading Limited at a price of \$9.14 per U.S. barrel of light crude oil and \$10.06 per U.S. barrel of medium crude oil (App. p.T101,12). However, Esso purchased this cargo from E.I.C. on the basis of the net quantities set forth in the Bill of Lading at a price of \$10.658 per U.S. barrel for light crude and \$10.321 per U.S. barrel for medium crude (App. p. 17).

After loading was completed and prior to departure from Bonny, ullages (i.e. measurements) were taken of the vessel's cargo tanks. A certificate of tank ullage was then issued at Bonny by the shipper on January 21, 1974 which gave the "Total Cargo Ship Figure", in gross figures as 33,797 long tons of light crude oil and 27,687 long tons of medium crude oil, or a total of

61,484 long tons (gross). These figures were compared on the ullage certificate with the gross figures as set forth in the Bill of Lading and revealed a surplus of 48 long tons (App. p. 18).

The vessel sailed from Bonny at 1500 hours on January 22, 1974, arriving at Rotterdam at 1800 hours on February 7, 1974 (App. p. 21). Upon arrival at Rotterdam and prior to discharge, Esso caused the ullage measurements of the vessel's tanks to be taken to insure itself that the quantity of cargo that was loaded on board at Bonny was still on board the vessel prior to discharge (App. p. T29). These ullages were set forth in a Tanker Unloading Report dated February 7, 1974, prepared by Chevron Petroleum Maatschappij (Nederland) N.Y., ("Chevron") (App. p. 19). This report gave as the gross quantities of crude oil on board the vessel upon her arrival at Rotterdam 33,690 long tons of light crude oil and 27,278 long tons of medium crude oil, or a gross total of 60,968 long tons. (App. p. 19).

A second survey was conducted at Esso's request by the laboratory of Dr. A. Verwey, which indicated that upon the vessel's arrival at Rotterdam the gross quantity of light crude oil on board was 33,677 long tons, and that the gross quantity of medium crude oil on board was 27,484 long tons, or a gross total of 61,161 long tons. (App. p. 27, 34).

The report of Dr. Verwey's laboratory also gave the net quantities on board the vessel upon her arrival as 33,517 long tons of light crude oil and 27,025 long tons of medium crude oil, or a net total of 60,542 long tons (App. p. 27, 34). When these figures are compared with the net quantities set forth in the Bill of Lading which were the quantities Esso paid for and the quantities the vessel contracted to carry, the shortage is 327 long tons and not 516 long tons as found by the Court below.

Unloading commenced at 2135 hours on February 8, 1974 and discharge in the shore facilities designated by Esso was completed on February 9 at 1645 hours. (App. p. 21) Delivery was completed, and Esso took possession of the cargo, once it passed through the vessel's flange. (App. p. T. 32). Upon completion of discharge, a tank surveyor appointed by Esso issued the vessel a Dry Tank Certificate, which stated that the vessel's tanks were drained to his satisfaction. (App. p. 43).

The survey report conducted by Dr. Verwey's laboratory also gave measurements of the quantities of cargo found in the shore facilities after delivery of the cargo in gross figures of 33,471 long tons (254,668 U.S. barrels) of light crude and 27,404 long tons (194,934 U.S. barrels) of medium crude, or a total of 60,875 long tons

(449,601 U.S. barrels), a total of 129 long tons less than the gross bill of lading total. (App. pp.29, 36). The net measurements given in that same report were 33,312 long tons (253,649 U.S. barrels) of light crude and 26,947 long tons (192,010 U.S. barrels) of medium crude or a total of 60,259 long tons (445,649 long tons), some 610 long tons less than the net bill of lading total.

POINT I

THE DISTRICT COURT ERRED IN HOLDING
THAT A COMPARISON OF MEASUREMENTS
TAKEN OF THE VESSEL'S TANKS UPON HER
ARRIVAL AT THE DISCHARGE PORT WITH
MEASUREMENTS OF THE VESSEL'S TANKS
TAKEN AT THE LOADING PORT WAS THE
PROPER METHOD FOR DETERMINING THE
EXTENT OF THE VESSEL'S LIABILITY FOR
SHORT DELIVERY OF ITS CARGO

In holding that the vessel had short discharged a gross total of 516 long tons of its cargo, the District Court compared the ullages taken of the vessels tanks upon completion of loading at Bonny with ullages taken prior to discharge at Rotterdam. (App. pp. 8) First, if the Rotterdam ullages are to be used as the basis for the amount of cargo delivered, they must be compared with the bill of lading quantities, and not the Bonny ullages. Second, if the District Court's reasoning that the vessel's tanks were over-calibrated is carried to its logical conclusion, then Esso has failed to provide any reliable delivery figures, and as such has failed to conclusively establish a loss of cargo while it was in the hands of the carrier, as is its burden. Schroeder Bros., Inc. v. The Saturnia, 226 F.2d 147, 149 (2d Cir. 1955).

(a) The quantity of cargo loaded at Bonny

It is the contention of the Carrier that the District Court erred both as a question of fact and as a

matter of law in relying on the Bonny ullages as the amounts of cargo taken on board the vessel. Esso in effect admitted first by requesting the Carrier to admit (App. p. T. 12 and later at the trial (App. p. T. 50 that the vessel loaded a quantity of Nigerian crude oil at Bonny in the gross amount of 61,004 long tons and a net amount of 60,869 long tons. By Esso's own concession, the only dispute in this case concerned the figures at the point of discharge. (App. p. T. 50 Yet the District Court chose to rely on the higher (61,484 long tons gross, see App. p. T. 8) Bonny ullages as the quantities taken on board, despite these admissions by Esso.

If any further justification is necessary for relying upon the figures set forth in the bill of lading as the proper indication of the amount of cargo actually loaded, under the Hague Rules, which both sides concede to be applicable to this case, the quantities of cargo set forth in a bill of lading signed by the Master constitute prima facie evidence of the quantity of cargo stated therein.

The burden of disproving the accuracy of the bill of lading figures is only met by "very satisfactory evidence", 1 Carver's Carriage by Sea, §75, p. 64 (12th ed. 1971), or by "most cogent evidence", Venesta v. Walford Lines, [1922] 12 Lloyd's L. R. 139. At best the District Court found that the vessel's tanks were over-calibrated. (App. P. T.7)

Therefore, the Bonny ullages had to be inaccurate. As such, they do not show the bill of lading quantities to be erroneous.

Finally, it must be noted that the record shows not only that the Carrier contracted to carry 61,004 long tons of crude oil (gross bill of lading total) and not the 61,484 gross total set forth in the Bonny ullage, but the cargo invoices show that Esso paid for the bill of lading quantities, not the Bonny ullage quantities.

In short, it is apparent that from an examination of the facts on the record and the applicable law that the District Court erred in using the Bonny ullages as the quantity of cargo loaded on board the vessel.

(b) The quantity of cargo discharged at Rotterdam

The Carrier's position with regard to the discharge figures is that assuming that the ship's ullages were accurate, then the District Court was correct in relying on the Rotterdam ullages as the quantity of cargo discharged, since reliance on the shore measurements taken after the Carrier had discharged its cargo and its responsibility toward it had ceased was unjustified. (App., p. T. 7).

However, for reasons set forth in subdivision (a) of this Point, infra, the Carrier contends the Rotterdam ullages must be compared with the quantities set forth in the bill of lading. The comparisons reveal the following:

<u>Loading Figures</u>	<u>Discharge Figures</u>	<u>Difference</u>
Bill of Lading (gross) (App. p. 61,004 1/tons	Ship's ullage (gross) (Verway report, App. p. 61,161 1/tons	+ 157 extras
Bill of Lading (gross) (App. p. 61,004 1/tons	Ship's ullage (gross) (Chevron report, App. p. 60,968	- 36 1/tons

Thus a comparison of the Rotterdam ullages with the bill of lading in terms of gross quantities reveals a surplus or at best a minimal shortage, and a comparison of net total shows the Carrier's liability to be far less than the 516 long tons (gross) found by the District Court.

On the other hand, assuming that the District Court was correct in finding the vessel's tanks to be over-calibrated, then Esso has no reliable measurements to rely on in attempting to establish a shortage. Any ullages taken at Rotterdam were inherently inaccurate and therefore unreliable if the vessel's tanks were over-calibrated. As we have seen, any measurements taken at shore facilities were also unreliable as a matter of law since they were taken after delivery and after the cargo had passed out of the carrier's possession, and hence after its responsibility had ended.

Therefore there is no reliable measurement of the amount of cargo delivered. Esso has not conclusively established a shortage at all. This, taken together with the Dry

Tank Certificate issued by Esso's own surveyor, conclusively
exonerates the Carrier from any liability at all.

POINT II

THE DISTRICT COURT ERRED IN HOLDING
THAT THERE IS NO CUSTOM IN THE TANKER
TRADE FOR A CARRIER TO BE GIVEN A 0.5%
ALLOWANCE FOR LOSS OF CARGO IN TRANSIT

It was the Carrier's position in the Court below that there exists a well-known and generally accepted custom in the tanker trade of permitting a carrier a standard allowance for shortage upon delivery of cargo of 0.5%, for which no liability exists. This standard allowance serves a practical purpose in the tanker industry, since it encompasses such factors as evaporation and minor inaccuracies of measurements that are inherent in the carriage of oil cargoes. In short, the custom has arisen because the tanker industry realizes it is virtually impossible for the carrier to arrive at a discharge port with precisely the same amount of cargo that was loaded on board, and subjecting the carrier to liability for these minor shortages is impractical and unfair.

(a) The evidence.

The evidence introduced by the Carrier at the trial included the expert testimony of Mr. Alexis Nichols, the vice-president of the vessel's managers, Brokerage & Management Corporation of New York, who over the years with his previous employer handled hundreds of claims involving all of the major oil companies, and who is also an experienced

maritime arbitrator. (App. p. T. 109-116) He testified as follows:

"Q . . . [H]ave you become familiar with the custom in the industry with respect to those situations where there has been no cargo left on board a vessel, as evidenced by the dry tank tank certificate, in such a situation is there a custom in the industry with respect to a tolerance?

A Yes, sir.

Q Would you tell us what that custom is?

A The percentage has been assessed to be an average of one-half of one percent."

(App. p. T. 116)

The Carrier further offered a letter to E.I.C. (ex Esso International Company) from Esso dated February 28, 1974 (App. p. 45, 46), wherein it initiated its claim against the Carrier for the alleged cargo shortage. It is readily apparent from this letter that Esso itself recognized the customary 0.5% allowance for loss in transit. The letter read as follows in pertinent part: (App. p. 45).

"C and F Value in US dollars of the shortweight, calculated according to the formula:

(actual loss - 0.5 standard transportation loss) x laid down cost .
Rotterdam amounts to:

FOB value 2059 x 10.321 (API 25.76)	21,250.94
Freight value 306 LTNS x 4.75	
x WS 198.5	2,845.80
C & F value	<u>24,096.74"</u>

Furthermore, in his testimony Mr. Scott of E.I.C. confirmed that Esso was "apparently aware of such a custom". (App. p. T. 25) He later qualified his testimony by stating that this 0.5% allowance which was referred to in Esso's letter to E.I.C. was a "negotiating tool to try to resolve this claim quickly", and that it was merely "an allowance for settlement". (App. p.T. 33).

(b) An "allowance for settlement".

The District Court relied on this contention in part when it rejected the Carrier's argument that such a custom existed, concluding that "[t]he fact that an allowance may be used in settlements of cargo disputes does not entail that it should be treated as a rule of law."

It is the Carrier's position that whether this custom exists or not is a question of fact, not a rule of law, and the facts as gleaned from the evidence on the record clearly supports its position that the tanker industry recognizes this 0.5% allowance.

Mr. Scott attempted to explain Esso's reference to this allowance in its letter to E.I.C. above referred to as being used for settlement purposes. However, upon close scrutiny this contention has no merit. The record indicates that Esso had a contractual arrangement with E.I.C. whereby E.I.C. would supply Esso with Crude oil and would, among other ancillary functions, handle collection assistance and

settlement of claims. In its letter to E.I.C., Esso, in incorporating the "0.5 standard transportation loss" into their statement of claim, made no reference to its being used for settlement purposes, and for an obvious reason - it was E.I.C.'s obligation under their contract to handle the settlement of claims, not Esso's. The Carrier fails to see why Esso would be incorporating an allowance for settlement purposes in a letter not to the Carrier, but to its own claims analyst, or why Esso would even be suggesting settlement terms, since the negotiation of settlements was E.I.C.'s responsibility. On the contrary, the letter contains no reference to its claim being reduced for settlement purposes but rather indicates the full extent that Esso considered the Carrier to be liable.

It becomes apparent, then, that although Mr. Scott, in his function as a claims analyst for E.I.C., may have felt that the 0.5% allowance was a mere negotiating tool, Esso, the claimant herein, felt differently, and clearly recognized the custom in the trade of allowing a 0.5% loss in transit for which no liability existed.

Moreover, Mr. Scott when initiating the claim through Carrier's brokers clearly recognized this tolerance stating: (App. p. 39)

" . . . Upon discharge the consignee reported a loss of 628 long tons of crude, after allowing for a 0.5% loss tolerance."

In the same letter he outlined the claim again making allowance for the 0.5% loss tolerance. (App. p. 39).

(c) Arbitral precedent.

As a further reason for rejecting the Carrier's contention regarding this allowance, the District Court noted " . . . the defendants have cited no authority supporting its applicability in litigated cargo cases." In its post-trial memorandum of law the Carrier did refer the Court below to a maritime arbitration award, the Virginia Lily, (Society of Maritime Arbitrators, Award No. 1052, Aug. 31, 1976, Addendum #1) wherein the arbitrators (Sommer, Loeffler, Berg), stated the following in rejecting the charterers' claim that a cargo of light Iranian crude oil was short delivered:

"Charterer has failed to prove a loss of cargo on board the vessel in excess of the generally accepted 1/2% and the panel is unanimous in its opinion that the claim must be denied." (S.M.A. No. 1052 at 3).

Since the date on which the Carrier's memorandum was submitted the Society of Maritime Arbitrators has published its more recent awards, two of which, the Marianthi K, (Society of Maritime Arbitrators, Award No. 1058, Oct. 5, 1976, Addendum #2), and the Evros, (Society of Maritime Arbitrators, Award No. 1059, September 27, 1976, Addendum #3), clearly recognize this 0.5% loss allowance.

In the Marianthis K, supra, the panel, (Siebel, Nester, Litzler), although refusing to grant this allowance because part of an oil cargo was left on board the vessel, nevertheless, recognized that this 0.5% allowance would be in effect if all of the cargo had been discharged, stating as follows:

"The Panel finds that the Owner's claim of an allowance of 1/2% for loss of cargo is not valid in this instance. The customary allowance of 1/2% is to cover evaporation, etc. If the vessel had been dry on completion of Discharge, the 1/2% would have been in effect, but when the non-evaporation cargo was measurable and remained on board the Vessel, the Charterers are entitled to compensation." (S.M.A. No. 1058 at 3).

is
Since it/conceded that the vessel in the instant case discharged its entire cargo, under the decision above quoted the Carrier is entitled to an allowance of 0.5%.

The decision of the arbitrators in the Evros, supra, clearly illustrates that this allowance is one for which no liability exists, and is recognized by the tanker industry as such, and is not a mere settlement tool. There the panel (Cederholm, Boulalas, Kerwin), in analyzing a claim for a shortage in an oil cargo, held:

"[I]t is standard practice to grant the vessel a clingage and wastage trade loss allowance of 0.5% on most oil cargoes when computing the quantity the vessel is responsible to deliver The Panel therefore applies the 0.5% trade loss to

Charterers' claim for 5235 bbls.
[barrels] reducing them to 4103.93
bbls" (S.M.A. No. 1059 at 5)

From the above-quoted arbitration awards, involving panels consisting of commercial men of long experience in the maritime industry or admiralty lawyers, it becomes apparent that this 0.5% loss allowance is indeed a well-recognized custom of the trade. However, the District Court chose to ignore arbitral precedent on this point, stating in the absence of any litigated cargo claim recognizing this allowance, it would reject the Carrier's contention.

The Carrier submits that in taking this stance the Court below was clearly in error, and that arbitral precedent involving a question of fact, i.e., the existence of this allowance as a custom of the tanker trade, although not binding on the Court, was persuasive authority that such a custom in fact existed.

The chief reasons why commercial arbitrations have been encouraged, particularly in recent years, is not only to ease the congestion in the courts, but also to provide a vehicle whereby disputes in a particular industry can be dealt with by people with the necessary expertise to understand the technical aspects of a given case. The issue of whether there is a custom in the tanker trade of a 0.5% allowance is precisely the type of question commercial

arbitrations are intended to handle. The panels in the arbitrations above referred to constituted a body of experienced and informed judgment in the maritime industry, and as such their opinion on essentially a factual question of a technical nature, not a rule of law, should be considered highly persuasive.

Such a consideration on this Court's part would not be entirely without precedent. Frequently, the courts have turned to the opinions of the various administrative agencies for guidance in technical matters. See eg. Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 134 (1944); Sonken-Galamba Corp. v. Thompson, 225 F.2d 608 (10th Cir.), cert. den. 350 U.S. 896, 76 S. Ct. 154 (1955). The same rationale for seeking the guidance of administrative agencies on factual questions involving their technical expertise is equally applicable in the instant case. No one is better qualified to determine whether the custom in question exists than commercial men involved in the maritime industry.

(d) Custom of trade incorporated by reference.

In its conclusions the District Court also noted that neither the bill of lading nor the charter party made reference to this loss allowance. However, neither the charter party involved in the Virginia Lily and Marianthi K arbitrations, an Exxonvoy '69 form, nor the charter party involved in the Evros arbitration, a Beepevoy form, make

any reference to this trade allowance, yet the arbitrators in those cases recognized this custom as being so generally accepted throughout the tanker industry as to incorporate it as a term of said charters. This same reasoning is applicable to the bill of lading in question as well.

As was stated by the Court in du Pont de Nemours International, S. A. v. S. S. Mormacvega, 367 F. Supp. 793, (S.D.N.Y. 1972), aff'd 493 F.2d 97 (2d Cir. 1974):

"Trade usages sanctioned by the passage of time, are presumed to be within the knowledge of parties regularly engaged in the business, in this case the shipment and carriage, respectively, of goods by sea. All contracts are presumed made with reference to trade usages and practice." (367 F. Supp., at 797).

Furthermore, despite Mr. Scott's testimony that he was unaware of any allowance for a loss of cargo in transit, not only does the record indicate that Esso was well aware of it, but the law is clear that the personal knowledge of a trade custom need not be had by the parties to a contract before the custom may be incorporated into the contract. The parties are presumed to contract with reference to general customs. Gleb v. Automobile Ins. Co. of Hartford, 168 F.2d 774 (2d Cir. 1948).

As such, the Carrier respectfully submits that the Court below erred in part in rejecting the customary trade allowance because neither the charter party or the bill of

lading referred to it, since the law is clear that trade customs are presumed to be mad part of a contract by reference.

(e) Summary.

It is the Carrier's contention that the Court below was in error in rejecting the custom of the tanker trade of permitting an allowance of 0.5% for loss in transit for which no liability arises. This custom of the trade, when applied to the instant case, yield the following:

District Court Finding	Less 0.5% of 61,484 1/tons	=Liability
(516 long ton shortage)	(Bonny ullage)	
516 1/tons	307.42 1/tons	= 208.58 1/tons

When the gross bill of lading totals are compared with the gross Rotterdam ullages, (see p. 11 *infra*) the shortage is a mere 36 long tons, well within the allowance. Similarly a comparison of net measurements (see p. 11 *infra*) shows a 157 long ton surplus on discharge and obviously no liability.

CONCLUSION:

It is respectfully submitted that the order and judgment of the United States District Court for the Southern District of New York, Hon. Marvin E. Frankel, Judge, granting Appellee damages should be reversed with costs in

this Court to Appellant.

Dated: New York, N. Y.
March 25, 1977.

Respectfully submitted,

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A D D E N D U M

(1052)

1. Freight Unpaid
2. Cargo Short

In the Matter of an Arbitration

-between-

REDERI AB SALENIA, Stockholm Sweden,
as Chartered Owner of the
M/S VIRGINIA LILY,

A W A R D

-and-

PETROL RICO., as Charterer.

APPEARANCES:

For Rederi AB Salenia,

Haight, Gardner, Poor & Havens
R. Glenn Bauer, Esq., of Counsel

For Petrol Rico Ltd.,

Milgrim, Thomajan & Jacobs
Robert Thomajan, Esq., of Counsel

BEFORE:

Richard H. Sommer, Esq.
Christian Loeffler
Jack Berg, Chairman

The disputes which are the subject of this arbitration arose out of the carriage of a cargo of light Iranian crude by the M/S Virginia Lily under a Tanker Voyage Charter Party, Exxonvoy 1969 Form, dated April 30, 1974. The charter was for a single voyage from a safe Persian Gulf port to one or two safe Caribbean ports. The vessel loaded at Kharg Island and discharged at two Caribbean ports, St. John's Antigua and Yabucoa, Puerto Rico. The dispute is between the Time Chartered Owner, Rederi AB Salenia of Stockholm, Sweden (Owner), and the Voyage Charterer, Petrol Rico Ltd., (Charterer).

THE DISPUTES

The disputes placed before the Panel are as follows:

- (1) Owner's claim that Charterer wrongfully deducted from freight the amount of \$52,597.09. This claim is accompanied by a demand for interest at 11% per annum from June 21, 1974

plus the cost of the arbitration proceeding including reasonable attorney's fees.

- (2) Charterer claims shortage of cargo on the voyage amounting to \$52,597.09, which amount was deducted from the freight.

THE PROCEEDINGS

Two hearings were held and documentary evidence was presented by both parties. No witnesses were introduced.

DISCUSSION

The charter contained a freight clause worded as follows:

"2. FREIGHT shall be at the rate stipulated in Part I and shall be computed on intake quantity (except deadfreight as per Clause 3) as shown on the Inspector's Certificate of Inspection. Payment of freight shall be made by Charterer without discount upon delivery of cargo at destination, less any disbursements or advances made to the Master or Owner's agents at ports of loading and/or discharge and costs of insurance thereon. No deduction of freight shall be made for water and/or sediment contained in the cargo. The services of the Petroleum Inspector shall be arranged and paid for by the Charterer who shall furnish the Owner with a copy of the Inspector's Certificate." (emphasis added)

There is no dispute between the parties as to the cargo quantity loaded and the freight to be paid by applying World Scale 79½. Charterer's deduction of \$52,597.09 was made on the basis of their computation of the value of the cargo shortage for which they consider Owner liable.

These are the questions to which the Panel must direct itself.

- (1) May Charterer make a deduction from freight for an alleged cargo shortage where the applicable freight clause reads as it does here?
- (2) Is the evidence before this Panel sufficient to establish the cargo shortage claim alleged by Charterer?

DECISION

The freight clause requires payment "without discount" less disbursements made to the Master or Owner's agents. The clause is sufficiently clear and the words unmistakably lead to one conclusion;

freight is computed on "intake quantity" and, when the intake quantity not in dispute, Charterer is obliged to pay the full freight. Charterer has no right to withhold payment of freight by deducting the value of outstanding claims, whether they be for cargo shortage or for other matters.

Charterer's contention that they have the right to withhold freight for cargo shortage when security is not supplied by Owner is erroneous and without legal or commercial justification. Although it may be a more circuitous route, it is hardly futile, as Charterer claims, to pay the freight and then attach portions of it for security purposes.

Charterer's claim for cargo shortage was presented in a clear and logical manner, pointing to the many inconsistencies and contradictions in the vessel's port summaries and calculations. It is the burden of the Charterer to establish that a cargo shortage did in fact exist and the extent of it. Because the charter party relieves Owner of the risk of discharge beyond the vessel's permanent hose connections, it is Charterer's obligation to establish the existence of a cargo shortage on the vessel itself, and certainly prior to the time the cargo is pumped through the ship's manifold.

Although there were Saybolt reports issued for the loading port and the first discharge port, there were none for the final discharge port in Puerto Rico. Quantity figures taken from the receivers shore tanks, attested to by an employee of the receivers, is not a proper method of establishing the amount of cargo in ship's tanks or the quantity discharged through the vessel's manifold. Charterer has failed to prove a loss of cargo on board the vessel in excess of the generally accepted $\frac{1}{2}\%$ and the Panel is unanimous in its opinion that the claim must be denied.

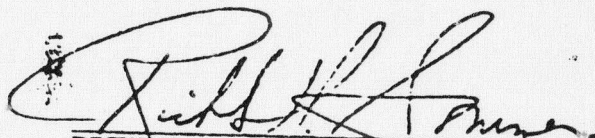
AWARD

Charterer is directed to pay Owner the unpaid freight of \$52,597.09 plus interest at 8% per annum from June 21, 1974 to the date of this Award, equal to a total of \$61,818.83.

As part of this Award, the Panel declares the hearing stenographic expenses to be equally shared by the parties, and legal fees and expenses are for the account of the party incurring them.

The Panel has fixed its fee for rendering this Award at [REDACTED] and liability for payment of this fee is the joint and several obligation of Owner and Charterer. We direct that payment should be made by Owner and Charterer, each remitting to each of the arbitrators the sum of [REDACTED]

This decision may be entered in the United States District Court for the Southern District of New York in accordance with the Federal Arbitration Act (Title 9, United States Code).


RICHARD H. SOMMER, ESQ.


CHRISTIAN LOEFFLER


JACK BERG, CHAIRMAN

New York, New York

August 31, 1976

1058

* IN THE MATTER OF THE ARBITRATION *

* BETWEEN *

* BULK OIL PRODUCTS A.G. *

* OWNER OF TANKER MARIANTHI K. *

* AND *

* ILFORD SHIPPING & TRADING CORP. LTD. *

* CHARTERER *

2

1. Demurrage
2. Grease 1/2 P.
AWARD
Failure to maintain specific temps of cargo oil.

A dispute arose between Bulk Oil Products A.G., Chartered Owner of the M.T. MARIANTHI K. and Ilford Shipping & Trading Corp., Ltd., the Charterer under the terms of an Exxon 1969 Voyage Charter Party dated New York October 10, 1973.

The Owner nominated Mr. Joseph M. Nester as arbitrator and the Charterer nominated Mr. Louis B. Litzler. The two appointed Mr. Peter Siebel, Jr. as the Third member of the Panel.

The dispute entails a deduction from freight of \$7,902.00 for cargo retained on board and \$57,800.25 for claimed demurrage earned. The Owner therefore claimed the sum of \$65,708.25 plus Interest. A Submission Agreement was signed at the Second of Two hearings stipulating the above amounts in dispute.

Two hearings were held and evidence was submitted by both Parties. Evidence and Records requested by the Panel was not submitted by either party and several questions remained unanswered.

The loading port log of the Terminal (Suppliers), the loading Saybolt Ullages and the Dry Certificate were asked for but not received by the Panel.

In lieu of Discharging Port Terminal port logs, an affidavit was submitted.

The Panel studied the evidence as submitted and the oral and written arguments of the parties and based on the material submitted rendered this award.

DISCUSSION

The vessel arrived at loading port and since no evidence to the contrary was submitted used 108 hrs. 05 minutes to complete loading. Since the Charter Party allows 72 hours laytime, the Vessel was on demurrage at Completion of Loading for 36 hours, 05 minutes.

The Vessel arrived and tendered at first discharging port. On arrival, the Vessel did not have her cargo to the required Charter Party Temperature, claiming Heavy Weather damage and lack of water to be the cause. It is noted that the Vessel never did attain the specified 135°F even though the receivers did concede to 125°F.

The Marianthi K. did not have the proper connections for the shore hoses, and was delayed in the commencement of discharge at the first port for two reasons; No.1- No water and cold cargo; No.2- no usable flange or reducer.

Therefore the receivers only utilized one hose in lieu of the two hoses specified in the Charter Party.

The Charterer maintained that the Vessel never attained the required (by C/P) 100 P.S.I. pressure at the ships' rail as the receivers manifold indicated only 20 P.S.I. at both discharging ports.

On completion of discharging at Boston the vessel was advised that it would not be discharged at Salem unless and until the cargo was at the proper temperature. The Vessel stayed alongside of the Berth in Boston for 18 hours 50 minutes and then was shifted to Salem. Since the cargo was not sufficiently heated, the Vessel was held out of the Berth until December 4, 2105 hours, a total time of 32 hours and 45 minutes.

AWARD

The Panel finds that the Vessel was delayed in discharging due to failure to maintain Charter Party specified temperatures 51 hours and 35 minutes.

The Panel further finds that the Vessel failed to discharge the cargo in accordance with her published pumping rates and evidence furnished the Panel./

Therefore the Panel allows the Owner 22 hours demurrage for discharging.

The total demurrage award the Owner is:

58 hours 05 minutes @ \$457.50/hr. or	\$26,573.13 plus
interest of	<u>4,650.30</u>
	\$31,223.43

The Charterers established that the Owner retained on board 439.03 Bbls. of measurable cargo. The Panel finds that the Owner's claim of an allowance of 1/2% for loss of cargo is not valid in this instance. The customary allowance of 1/2% is to cover evaporation etc. If the Vessel had been dry on completion of Discharge, the 1/2% would be in effect, but when the non-evaporation cargo was measurable and remained on board the Vessel, the Charterers are entitled to compensation. However since the Charter Party specifically states that there shall be no deduction from Freight, the Panel finds that the Charterer is entitled to retain the sum of \$7,902.00 for the cargo retained on board, but must pay interest for having withheld monies from freight in violation of the Charter Party. The Charterer is to pay the Owner the sum of \$1,475.20 Interest.

SUMMARY OF THE AWARD

Charterer pays Demurrage plus Interest \$31,223.43

Interest on Freight Money	<u>1,475.20</u>
	\$32,698.63

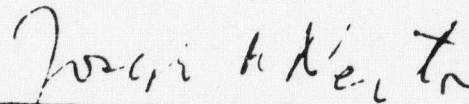
The cost of the arbitration to be born equally by both parties and the cost of the transcript to be equally shared and whichever party has outlaid for same is to be reimbursed for one half of the outlay.

The Panel sets its fees at ~~any~~ per arbitrator, total ~~any~~, each party paying one half. The Chairman shall be reimbursed for his expenses for hearing room, Stenographic costs and long distance phone calls in the amount as follows:

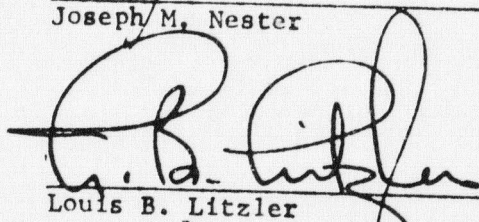
Hearing Room - 2 sessions	\$50.00
Stenographic expenses	25.00
Long Distance phone calls	19.00
	<u>\$94.00</u>

Each party to pay one half of this sum to the Chairman.

The Charter Party and the Submission Agreement provide that the award may be made a judgement in the U.S. District Court for the Southern District of New York.



 Joseph M. Nester



 Louis B. Litzler



 Peter Siebel, Jr., Chairman

Dated: New York October 5, 1976

1 In the Matter of the Arbitration 1
1 -between- 1
1 OSTRIA ARMADORA S.A., Owners 1
1 of the S/T EVROS 1
1 -and- 1
1 JOC OIL U.S.A., Inc., Charterers 1



&
AWARD:

1. Freight Unpaid.
2. Demurrage.
3. Failure Main-
tain Cargo Oil Temp.
4. Cargo Oil Short.

3

Before Arbitrators: Angelos Boulalas
Kevin Kerwin
Hammond Cederholm,
Chairman

Appearances:

Healy & Baillie, Attorneys for Owners
Raymond A. Connell, Esq., of Counsel

Donovan, Donovan, Maloof & Walsh, Attorneys for Charterers
Richard E. Repetto, Esq. and
Bartholomew J. Hennessey, Esq. of Counsel

Background: This dispute arises out of a BEEPEVOY form voyage charter party dated Hamburg Oct. 5, 1973 between the above captioned parties. It provided for a full cargo of 33,000 tons 5% M/L, "1-2 grades crude and/or dirty petroleum products" from "1-2 safe ports Black Sea" to "1-2 safe ports USAC....." The freight rate was set at World Scale 420.

When the charter was fixed on October 5, 1973 JOC intended to load at Constanza. The Arab-Israeli War broke out on October 6, 1973. The parties then reformed a new charter party with the same date and terms except JOC directed the ship to load at Sicily; the freight and demurrage rates were increased to WS 515; laydays were adjusted from Oct 25-Nov 8 to Oct 20-Nov 8, 1973 and an oil pollution clause was added.

The Owners inaugurated this arbitration to recoup the following claims, advised to the Panel without benefit of submission agreement and adjusted during the proceedings:

Owners' Claims -

1. Unpaid freight plus 8% interest from Nov. 16, 1973	\$ 60,145.96
2. Expenses of removing unpumpable residue cargo from vessel plus 8% interest	990.99
3. Demurrage plus 8% interest from Nov. 16, 1973	43,725.48
4. Interest of 8% from Nov. 16 to Dec. 31, 1973 on late payment of portion of freight in the amount of \$16752.00	161.48
5. Costs of this arbitration	-
Total	\$105,023.91

Charterers' Claim:

- A. Undelivered cargo shortage claim 5235 bbls of oil
@ \$8.30 plus .14¢ per bbl second port differential \$ 44,183.40

One hearing was held at which Owners presented 2 witnesses and numerous exhibits. Charterers did not submit any evidence. Both sides furnished the Panel main and reply briefs.

Argument and Decision

The arbitrators met and duly considered all aspects of the respective positions of both sides and the evidence or lack of same in support thereof.

The charter party provided in clause 1d: "the vessel is fully fitted with heating coils in all cargo tanks and Owners undertake to heat to and maintain all cargo at up to 135° F. in accordance with Charterers' instructions".

Clause 26: "Heating of Cargo - Owners undertake that if required the cargo shall be heated on passage to and whilst at the discharge port or ports in accordance with instructions given by the cargo suppliers at the loading port or ports, or by Charterers prior to loading or enroute to the discharge port or ports."

Rider clause b. (typed) "Heating - For cargoes of crude oil and/or dirty petroleum products Owners undertake to heat all cargo to and maintain at up to 135° F. in accordance with Charterers' instructions."

On October 19, 1973 Charterers issued telex instructions to the Owners for delivery to the vessel confirming Priolo as the loading port, advising there was to be 33,000 tons 5% MOLCO cargo, the type of cargo to be lifted and giving names of shippers and Charterers' agents to whom the vessel was consigned. Over and above sailing orders and radio advices to be given by the master, Charterers instructed the master also: "Chrts have recently encountered considerable short deliveries at discharge port and request therefore that Chrts make it a special point in their instructions to vessel command that the loading quantity presented by shippers at load port is most carefully checked."

"Important

All cargo throughout voyage and discharge is to be carefully heated to and maintained at 135 Fah. Master to give due consideration to losses in

temperature due to bad weather/cold currents. Receivers may refuse to take delivery if cargo is underheated....."

The EVROS arrived at Priolo on Oct. 21, 1973, commenced loading on Oct. 24th, finished loading and disconnected hoses on Oct. 25th, then waited for cargo documents to be delivered according to the statement of facts until Oct. 26th at 0900 after which it sailed at 1000 hrs Oct. 26th for New York.

The vessel was loaded under supervision of a Saybolt inspector at Priolo. When the master was requested to sign the bills of lading and other cargo documents on Oct. 26th he protested that his own measurements indicated there was aboard 32391 M.T. versus 31949.233 M.T. as stated by shippers, or an extra quantity aboard of 441.767 M.T. He gave the shippers a written protest to this effect which they duly acknowledged.

The Charterers have previously refused to accept this difference in quantity and withheld freight of \$60,145.96 to date. Charterers now concede Owners are due such freight balance on the basis of substantiating measurements made by 3 surveyors arranged by Charterers and by Owners and their P and I representatives on arrival at Stapleton, the first port of discharge. Having acknowledged the correctness of the cargo load and balance of freight due Owners, the Charterers assert against this sum their claim for 5235 bbls of oil that is agreed in quantity by both parties as unpumpable cargo remaining in the tanks after completion of discharge at Groton, the second and final unloading port. The vessel sailed away to Savannah with this congealed residue aboard and subsequently discarded it as slops.

It is Owners' position that the Charterers originally intended to load at Constanza a "low pour" crude oil for which this vessel with her represented heating capacity of 135° F would have been adequate. This heating requirement was the same in both charter parties. When the Charterers changed the charter and the load port to Priolo, Owners feel Charterers overlooked the fact that the "high pour" crude that came from that new port required higher heat applied to the cargo than the 135° F. contracted in the charter party, therefore Charterers must absorb any losses that accrued from the inherent nature of their product and their failure to utilize a ship of greater heating ability to keep their cargo in a proper

condition for pumping out every last bit of it from the tanks. The Owners claim for \$990.99 is for crew labor on overtime and the cost of chemicals to dissolve the hardened wax fuel sediments and to clean the tanks free of its residues.

The Charterers showed that the fuel was loaded aboard at 155° F. but the ship failed to maintain the temperature in all tanks at the required temperature of 135° F. from the outset of the voyage. The mate kept daily temperatures in a note book for this trip and others and the master made an extract from that book which he and the mate signed. These both show that during the first 6 days of the 17 day voyage only the 10 center tanks out of vessels 30 tanks generally maintained a temperature between 135° and 150° which more than met the Charterers instructions and their right under the charter to have the temperature all during the voyage at 135° F. However, only a few of the other 20 wing tanks on both sides of the centers ever reached 135° during these same 6 days and those few did not exceed 141°. During the other eleven days enroute even those 10 center tanks which enjoyed the insulation effect of the port and starboard tanks never again reached 135° until arrival at Stapleton, nor did any of the wing tanks except that 3 of them, on one day only, rose up to the required 135° from lows recorded down to 98° F. The master made an entry in the deck log most days in which he recorded one "average" temperature for all tanks. Owners were of the opinion this figure deserved recognition because it was at or above 135° on all but one occasion. The Panel did not find the log entries consistent with the temperature book or the extract therefore we disregarded it.

Evidence revealed that this vessel, when built in 1957, was without heating coils. They were installed partially at Glasgow in March of 1973 when the Owners in this proceeding purchased the vessel. The installation of the coils was finally completed at Swansea in May of 1973. The coils had not previously been used to heat a cargo before this one. Although the master tested the coils the day before arrival at Priolo and found them in good working order, those in 4 tanks showed leaks and the heat had to be shut off completely from those 4 tanks shortly after leaving Priolo, and they remained unheated during the voyage.

Owners presented expert opinion that even if 135° F. had been perfectly maintained on the voyage the nature of low sulphur fuel oil is

such that it would still have been impossible to pump out all the waxy sediment remains of this cargo unless it was heated to 160° - 170° F. as per customary standards in the trade which the Charterers failed to contract for.

The Panel finds no merit in the argument of the Owners which may be euphemized as they failed to maintain the required 135° in all tanks throughout the voyage but even if they had, the cargo would not have been completely pumpable anyway because it required 170° F which Charterers did not arrange. The numerous references to the heating requirements in this charter and in the special instructions to the master cannot help but make heating to 135° a material point going to the essence of the contract. The benefits of higher heat are undoubtedly true but this does not excuse Owners from their breach of the contract. Owners' failure to fulfill this absolute heat requirement makes them liable for the loss of that portion of the cargo they failed to deliver as measured by the customary standards of the trade. .

In this regard, it is standard practice to grant the vessel a clingage and wastage trade loss allowance of 0.5% on most oil cargoes when computing the quantity vessel is responsible to deliver. Charterers assert that this trade allowance only applies to unexplained losses and should not be applicable where the reason for the loss is known as in this case. Although the 5235 bbls were a measured quantity in the tanks, it does not follow that such an amount could have been pumped overboard even with high heat as the stripping pumps never drain the tanks completely. The Panel therefore applies the 0.5% trade loss to Charterers' claim for 5235 bbls reducing them to 4103.93bbls at the delivered price they evidenced to the Panel at \$8.30 per bbl plus \$.14 per bbl second port allowance and we add 8% interest from Nov. 28, 1973, when Charterers invoiced receivers for the shipment.

Owners are denied their claim for cleaning expenses totalling \$990.99 because the residues are attributable to their own default.

Against Owners' demurrage claim for \$62,074.34 Charterers paid \$18,348.86 leaving the disputed balance claimed by Owners at \$43,725.48. Charterers are willing to concede another \$2002.11 as due and owing to Owners but otherwise they disclaim liability for (a) the delay of 21 H 10 M between completion of loading at Priolo and the placing of cargo

documents on board; (b) the 6 hour periods mentioned in clause 13 of this charter for laytime commencement after presentation of readiness notices at Stapleton and Grotton where Owners assert the vessel arrived on demurrage, in each instance, thereby nullifying such "grace" periods; (c) alleged slow pumping by the vessel of the improperly heated cargo against an alleged 50 p.s.i. average back pressure, and vessel's failure to provide adapters for additional shore lines.

The Panel took note that the vessel was consigned to Charterers' agents under clause 24 for Custom House business. Despite Charterers' stand that the master's protest of the bill of lading quantity was invalid and caused an unnecessary delay in sailing because his measurement tables did not allow for the recently installed heating coils, the master's claimed extra quantity on board was substantiated at Stapleton and Charterers belatedly confirm the same by paying freight on it. Charterers' special instructions requested the master to check carefully the bill of lading quantity at load port. Furthermore, he had requested "early departure" permission on arrival but the agents refused saying the procedure of radioing to the ship the bill of lading figure for insertion in the bill of lading after quick sailing on completion of loading was not possible at this port. The majority opinion is the Charterers' agents simply delayed the placing of the documents aboard and no fault has been proved to attach to the vessel. Charterers are therefore liable for the delay at Priolo and it counts as lay time. Mr. Kerwin's dissent is attached.

Since the charter party allowed only 72 hours laytime for loading and discharging, and 72 hours were used exactly at Priolo, the vessel was on demurrage upon arrival at Stapleton in our opinion. We do not accept Charterers' argument that the 6 hours notice periods are not laytime because clause 15 only provides that demurrage is payable where "time counting as laytime" exceeds allowed laytime, and because clause 13 only delineates laytime as such that commences at the expiry of 6 hours after notice of readiness is received. In our view the following underlined parts of clause 15 that read

"Charterers shall pay demurrage..... for all time that loading and discharging and time counting as laytime exceeds the allowed laytime specified in clause 14 hereof....."

embrace these 6 hour "grace" periods. The 6 hours are not laytime but they certainly are "all time" that exceed the 72 running hours (SHEX) allowed

by clause 14 as the "amount of laytime" for loading and discharging. The delay time used by Charterers to put the cargo documents on board at the load port is synonymous with loading time even though loading had been accomplished. We think it is not detention. Since the amount of laytime has been exhausted, it seems quite clear that beyond that, any time in port (not excepted) after arrival is also for Charterers purposes and becomes "all time" for which demurrage is payable by the Charterers. Accordingly, we find the 6 hours at Stapleton and Groton both to be demurrage time.

The receivers at Groton only had one adapter by which they could couple a 6" line to the vessel's manifold. Charterers say the vessel with its British style manifolds and extra adapters should also have carried American couplings to accommodate additional lines with American fittings the Charterers had available. Since clause 11 provides that the cargo was to be pumped by the vessel on discharge "as far as the vessel's permanent hose connections only" we do not feel the vessel was obliged to carry extra adapters for whatever might be confronted on shore beyond its own manifold.

Charterers allege the average back-pressure at the Groton shore terminal was less than 50 lbs. p.s.i. and that the vessel never met its clause 11 obligation to pump "at the minimum average rate of 5% hourly of vessel's intake provided the backpressure does not exceed 100 lbs/p.s.i. at ship's manifolds". Charterers submitted no proof of the alleged 50 lbs. p.s.i. but the master did testify and submitted a pumping log showing the back pressure registered in the vessel's pump room while at Groton to be 125 lbs. p.s.i. Although Charterers contend this is not relevant to the pressure at the manifold we find it more indicative of proper performance than their unsupported assertion of lesser pressure.

The final point by which Charterers tried to justify a slow-pumping deduction of 22H 50M from Groton discharge time is that the improperly heated cargo did not pump out as fast as it should have. Charterers complete lack of evidence in this regard as to couplings and back pressures and shore equipment does not permit us to consider this allegation. The 4104 bbls of unpumpable residues we have awarded to Charterers did not affect demurrage because discharge time ended when free flowing cargo stopped.

Accordingly we disallow the Charterers' slow pumping deduction

and grant to the Owners their total demurrage claim of \$43,725.48 plus 8% interest from Nov. 16, 1973.

Charterers originally suspected Owners of diverting the unpumpable 5235 bbls of cargo to bunker use and based their shortage claim on a bunker price per bbl of \$11.50 which they withheld from freight. Eventually Joc reconsidered and based their shortage claim on the CIF price of \$8.30 bbl at which they sold the oil to the receiver. They paid the Owner the \$16,752.00 difference between these 2 figures on Dec. 31, 1973 some 44 days after due on the Nov. 16, 1973 completion of discharge. The Panel awards to the Owners their claim for 8% interest on this sum for that period totalling \$161.48 because Charterers deprived them of the use of their funds.

Recapitulation of Award

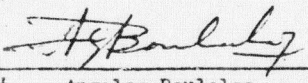
Due Owners		
	Balance of freight	\$60,145.96
	Demurrage	<u>43,725.48</u>
		\$103,871.44
	8% Interest on above from 11/16/73 to date	<u>23,793.94</u>
		\$127,665.38
	Add 8% interest for \$16,752.00 freight delayed from 11/16 to 12/31/73	<u>161.48</u>
	Total due Owner	\$127,826.86
Due Charterers		
	4103.93 bbls shortage	
	@ \$8.44 bbl	\$34,637.17
	8% interest from 11/28/73 to date	<u>7,843.49</u>
		<u>42,480.66</u>
Net total Charterers to pay to Owners		\$ 85,346.20

Each side is to pay its own legal fees but costs of the reporter are to be divided evenly between the parties.

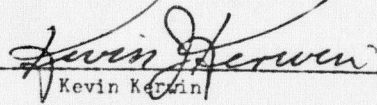
The Panel sets its fee at which is to be paid by Owners and Charterers each remitting to each arbitrator. In addition each side is to pay the Chairman for administrative expenses. The fees and expenses are a joint and several liability of both parties, each having the right of claimover in case he pays the default of the other.

This award may be made a judgment of any competent court.

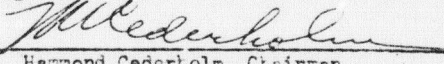
Agreed:


Angelos Boulalas

Agreed EXCEPT FOR PRIOR DELAY:


Kevin Kerman

Agreed:


Hammond Cederholm, Chairman

New York, N.Y.
Sept. 27, 1976

-----X
IN THE MATTER OF THE ARBITRATION :

BETWEEN :

OSTRIA ARMADORA, S.A., As Owners
of the S. T. "EVROS", :

AND :

JOC OIL U.S.A., INC., Charterers. :
-----X

Dissent by
Kevin J. Kerwin

Dissenting opinion respectfully submitted by Kevin J. Kerwin,
arbitrator with regard to laytime in the subject arbitration.

In all due respect to my fellow arbitrators, I disagree that the
time at Priolo from October 25th, 11:50 hours until October 26th, 09:00
hours - a period of 21 hours 10 minutes - counts as laytime.

Notwithstanding the unanimous decision of the panel in regard
to the S/S "VANTAGE HORIZON":

"Delay in departure from completion of
loading until cargo documents were
placed onboard was a situation within
the control of and the responsibility of
Charterer and its agents, and such time
counts as laytime".

I see no clear wording in the Charter Party that would justify
this time counting as time used for loading or discharging or in waiting for
berth.

In the Handy Book for Shipowners & Masters (1964) it is stated
on page 296:

"The loading or unloading of a ship may be
delayed by obstacles created by the charterer
himself. For instance, other vessels chartered
by him may be awaiting dispatch at the same

time and may slow down the rate of loading. In such circumstances the general rule is (as stated ante at page 284) that if the delay is caused by obstacles introduced by the Charterer, the Charterer is responsible for such delay. (Ogmore v. Borner, 1901) But the rule is subject to the limitation that if the Charterers' other commitments should reasonably have been in the contemplation of both shipowner and charterer at the time the charter was made, the charterer cannot be held responsible for the delay. (Quilpue v. Brown, 1904.)"

I find that the delays in obtaining clearance at Priolo is something that was well within the reasonable contemplation of the Owners and the Charterers as being customary for loading in Italian ports. Therefore, the Charterers cannot be held responsible for such delay.

Furthermore, in Laytime, (Second Edition, 1973, paragraph 1-09), it is explained:

"... Laytime can only be occupied by the Charterer if it is being employed by him for loading or discharging, or if some loading or discharging remains to be done. When loading has ended, for example, the Charterer must release the ship and present the bills of lading for signature within a reasonable time. This duty arises whether or not laytime has ended. A Charterer who is in breach of this duty is liable not for demurrage at the charterparty rate but for damages for detention of the ship, because demurrage is due only where the ship is detained for the purposes of working her."

In paragraph 1-10, *ibid*, it says:

"After loading or discharging has finished, the Charterer is not liable for any delay unless it arises from some fault on his part... But delays resulting from failure by the shipowner to secure clearances... have all been held to fall upon the shipowner."

Owners might possibly have a detention claim if they were able to prove that vessel was delayed deliberately by the Charterers, but it is clear, at least in my mind, that delays for obtaining clearance cannot be considered as counting as laytime.

Therefore, I would make laytime calculations as follows:

Priolo

N/R	October 21st, 22:00		
Laytime Comm	October 22nd, 04:00		
Oct. 22	0400/2400	20H	
Oct. 23	0000/1310	13H	10M
	1310/1450 Shifting		
	1450/1640	1H	50M
	1640/2400 deballasting		
Oct. 24	0000/0945		
	0945/2400	14H	15M
Oct. 25	0000/1150	11H	50M
		61H	05M

Stapleton

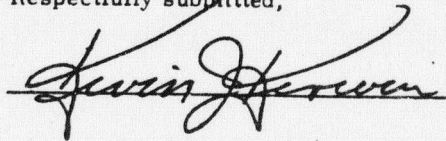
N/R	November 12th 19:10		
Laytime Comm	November 13th 01:10		
November 13	0110/1520	14H	10M
		75H	15M

[Vessel on Demurrage Nov. 13/12:05]

Groton

Arrived	November 14 08:20		
November 14	0820/2400	15H	40M
November 15	0000/2400	24H	
November 16	0000/0920	9H	20M
		124H	15M
	Less allowed	72H	
		52H	15M
	@\$800.83		

Respectfully submitted,



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
ESSO NEDERLAND b.v.,

Plaintiff-Appellee

-against-

M.T. TRADE FORTITUDE, her
engines, boilers, etc.
and MARASTRO COMPANIA NAVIERA, S.A.,

Defendants-Appellants
-----X

:
:
Docket No.
77-7075

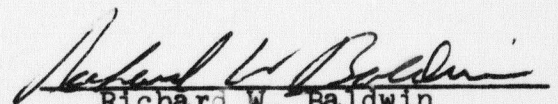
:
:
AFFIDAVIT OF
SERVICE

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

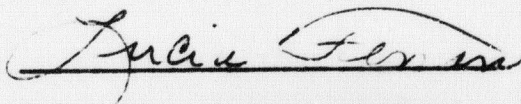
RICHARD W. BALDWIN, being duly sworn, deposes and says:

1. Deponent is not a party to the action, is over
18 years of age and resides at 3875 Waldo Avenue, Bronx, N.Y.

2. On March 25, 1977, deponent served two copies of
the Brief for Appellant, two copies of the Joint Appendix and
one copy of the Joint Appendix with Exhibits upon Kirlin,
Campbell & Keating, attorneys for plaintiff-appellee in this
action, at 120 Broadway, New York, New York, the address
designated by said attorneys for that purpose, by depositing a
true copy of same enclosed in a postpaid properly addressed
wrapper in an official depository under the exclusive care and
custody of the United States Postal Service within the State of
New York.


Richard W. Baldwin

Sworn to before me this
25th day of March, 1977.



LUCIA FERRARO
Notary Public, State of New York
No. 24-62776-15
Qual. in Kings Co. Cert. Filed N.Y. Co.
Commission Expires March 30, 1978